United States
COURT OF APPEALS
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,

v.

JOHN HUDSPETH, ET AL,
Appellees and Cross-Appellants.

On Appeal from the United States District Court for the District of Oregon

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

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REPLY TO APPELLANT'S BRIEF

SUMMARY OF ARGUMENT

This was a trespass action by the United States, based upon defendants' cutting of timber on lands claimed to be owned by the Government. The burden of proof is of course upon the Government. There is no dispute over the fact that timber was cut by defendants in the locations in question. The only question is whether the cutting was on the Government's

side of the boundary lines established in 1872 or on the defendants' side. As evidence of the location of that line, the Government relied solely on resurveys conducted by the Bureau of Land Management in 1959 and 1962, six and nine years after the last cutting. The critical question of fact, as posed by the pre-trial order, is whether these resurveys were accurate. The answer, as found by the lower court, is negative.

The Government's brief argues that defendants did not exhaust their administrative remedies to protest the 1959 and 1962 resurveys. However:

1. The pre-trial order contains no such contention and frames no such issue.

2. There was no evidence that administrative remedies were not exhausted.

3. The doctrine of exhaustion of administrative remedies is inapplicable where the Government, and not the citizen, initiates legal proceedings.

The Government's brief argues that the administrative decision, that is, the resurvey, was not shown to have been arbitrary or capricious. However:

1. The Pre-trial Order contains no such contention and frames no such issue. As aforesaid, the issue framed by the Pre-Trial Order was the *accuracy* of the resurvey.

2. Such a showing is unnecessary in this case. The statute giving the Department of Interior the authority to resurvey, 18 U.S.C. 722, expressly provides that

the resurvey may not impair bona fide existing rights. Since defendants' rights had vested long prior to the resurveys in question, the resurveys could not affect their rights, whether or not the department acted arbitrarily. If the resurveys in fact erred in favor of the Government, they operate to divest bona fide existing rights, irrespective of good faith, and so the Government's case must rest on a showing that the resurveys were in fact accurate.

The Government seems to argue that the resurvey must control if the resurveyor followed procedures set forth in the 1947 Department of Interior Manual of Surveying Instructions. However:

1. Nowhere in the Pre-tiral Order is there a contention that resurveys are conclusive if manual procedures are followed.

2. There was no evidence that the resurveyor actually followed manual procedures. The manual was not even introduced into evidence.

3. The governing statute also negates this argument. The resurvey cannot divest existing rights based on the original survey, and so the question must be whether the original lines were in fact accurately located by the resurvey. If in fact the resurvey does not accurately locate the original lines, the Government can gain nothing by the fact that the resurvey followed procedures set forth in the Department's Manual.

The Government argues that defendants were neg-

ligent in the procedures they employed to establish their lines before cutting. However, this contention, raised for the first time in the appellate brief, is irrelevant. The burden of proof is on the Government. If the Government establishes the location of the boundary lines contended by it, the defendants are trespassers; if the Government's proof in this respect fails, the defendants are not trespassers. In either case, the methods employed or not employed by the defendants are irrelevant.

The Government argues that compliance with the manual is evidence that the resurvey accurately located the lines of the original survey. However:

(1) There was no evidence of such compliance.

(2) There was evidence that the methods employed by the resurveyor, whatever their source, varied substantially from the methods employed by the original surveyor, and that this variance produced results on the ground substantially different from those of the original survey. The resurveyor admitted these differences in procedure, he admitted the differences in results, and, in response to a question from the court, he admitted that, despite his instructions to re-establish the lines of the original survey, he made the survey the way he thought it "*should* have been made" in the first place. The transcript makes it apparent that the procedures employed actually evidenced the *inaccuracy* of the resurveys.

(3) There was ample evidence, most of it from the Government's witnesses, that the resurveys in fact did *not* re-establish the original boundary lines. For example, there was evidence that the first corner marker found by the resurveyor, which he admitted was important to his findings, had actually been placed not by the original surveyor but by the landowners, some 60 years after the original survey. The resurveyor found very few markers, and there was evidence that most of these either were not markers at all or were markers placed in a private survey made in the 1930's.

The Government argues that the court's findings were insufficient. However, the issues were clear and it is plain from the findings that the court's oral ruling that the court found that the Government's case was based entirely on a survey which was not a true *re*survey designed to locate the original lines, but was rather an *entirely new survey* based on new and different methods and made with the intent of placing the lines where they *should* have been placed, and not where they actually *were* placed. As such, the resurvey was not competent evidence of the location of the original lines, and the Government accordingly failed to prove its case.

REPLY TO CONTENTION THAT DEFENDANTS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

1. There is no such contention or issue in the pre-trial order.

> "We need not comment upon the impropriety of this court considering reversal of a District Court judgment for failure to pass upon an issue which was never framed for consideration by that court." *First Federal Savings & Loan* v. *United States*, 295 F.2d 481 (9th Cir. 1961).

The pre-trial order herein, which was approved by the United States, purports to enumerate the contentions of the United States, the issue of fact and the issues of law. Nowhere in that order is this issue presented.

Rule 16 of the Federal Rules of Civil Procedure provides that the pre-trial order "controls the subsequent course of action unless modified at the trial to prevent manifest injustice."

> "One of the chief purposes of pre-trial procedure, and the principal usefulness of a pretrial order, is to formulate the issues to be litigated at the trial. The parties are bound by the pre-trial order. They may not later inject an issue not raised at the pre-trial conference. Otherwise the primary objective of pre-trial procedure would be defeated." *McCarthy* v. *Lerner Stores Corporation*, 9 F.R.D. 31.

In *First Federal Savings & Loan* v. *United States*, supra, the appellant's appeal brief argued that the

District Court erred in giving the Government specific performance of a lease for the reason that the promised consideration for the lease was inadequate. This court of appeals refused to consider this argument, stating:

> "If the question of adequacy of consideration had been made an issue in this case we might possibly find it necessary to remand the cause to the district court with directions to make a finding upon the question of the adequacy of consideration. However, the case was tried after a pretrial conference and on entry of an order defining the issues to be tried and setting forth the contentions of the parties with respect to the facts and the law. The question of the adequacy of the consideration and the fairness of the contract was not listed as an issue in the pretrial order which undertook to set forth all of the issues of fact and of law to be tried and determined by the court." 295 F.2d at 482.

2. There was no evidence that administrative remedies were not exhausted.

For all the record shows, defendants may have completely exhausted their administrative remedies.

3. The doctrine of exhaustion of administrative remedies is inapplicable where the citizen does not seek affirmative relief, but only seeks to defend himself in proceedings initiated by the government.

In all the cases cited by the Government (App. Br. 12, 16), the administrative agency was the *defendant.* This is no coincidence. The courts have point-

ed out that the doctrine of exhaustion of administrative remedies is inapplicable where the agency, not the citizen, goes to court for relief.

In *United States* v. *McCrillis*, 200 F.2d 884 (1st Cir. 1952), an action by the government to collect statutory damages for rental overcharges, the court rejected the Government's contention that the defendant landlord could not question the Government's determination of a maximum rent because he had failed to invoke available administrative procedures to set aside the order establishing the maximum rent:

> "It was pointed out in Smith v. United States, supra, that the discretionary rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief where he has failed to pursue an administrative remedy under which he might obtain the same relief, is wholly misapplied when invoked against a landlord who is not seeking equitable relief but is merely defending himself against an enforcement action. We distinguished cases where the landlord was a petitioner seeking equitable relief by way of an injunction or declaratory judgment." 200 F.2d at 885.

See also *Smith* v. *United States*, 199 F.2d 377, 381 (1st Cir. 1952), *United States* v. *Fritz Properties*, 89 F. Supp. 772, 77 (D.C. N.D. Cal. 1950), *Wood* v. *Laabs*, 92 F. Supp. 220 (D.C. W.D. Mich. 1950).

REPLY TO CONTENTION THAT ADMINISTRATIVE DECISION IS NOT SHOWN TO BE ARBITRARY OR CAPRICIOUS

1. There is no such contention or issue in the pre-trial order.

As pointed out previously, the pre-trial order "controls the subsequent course of action," Rule 16, Federal Rules of Civil Procedure, and issues not framed by the pre-trial order cannot be raised for the first time in the appellate court. The pre-trial order herein framed the issue of fact as to the survey as follows: "Did plaintiff *accurately* resurvey Township 11 South, Range 19 East, Willamette Meridian, Oregon, in accordance with the original surveys?" (Pre-trial Order, page 4, emphasis added).

In accordance with the pre-trial order, the case was tried and determined on the issue of the *accuracy* of the Government's resurveys, and not on the issue of arbitrariness or capriciousness.

2. The governing statute here makes it unnecessary to show that the administrative action was arbitrary or capricious.

43 U.S.C. 772 provides as follows:

> "The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential

> to properly mark the boundaries of the public lands remaining undisposed of: Provided, *that no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey* or retracement: . . ." [Emphasis added].

The emphasized proviso makes inapplicable any argument that the Government's action must be shown to be arbitrary or capricious. The controlling statute does not vest in the secretary any discretion to divest prior rights. If in fact a resurvey divests prior rights, it is invalid, whether the surveyor acted arbitrarily or in good faith.

Prior to the time of the resurveys relied on by the Government, the defendants herein owned or had cutting rights in the lands adjoining the Government lands claimed to have been trespassed upon, and in fact the cutting now alleged to have been a trespass took place prior to these resurveys (Agreed Fact No. 3, Pre-Trial Order, p. 2). Accordingly, defendants' rights had vested at the time of the resurvey, and the basis of their rights was the original survey of 1872. To the extent that the resurveys purport to deny them cutting rights established by the original surveys, the resurveys impair their bona fide rights and are invalid, irrespective of the nature of the conduct of the surveyor or other officials involved. The question must be that framed by the pre-trial order: Was the resurvey accurate? Did the resurveyor in fact reconstruct the original survey?

This contention is supported by the courts:

The purpose and effect of a Government resurvey is well summarized in the recent opinion of *Trustees of Internal Improvement* v. *Toffel*, 145 So. 2d 737 (Fla. 1962):

> "A corrected survey or resurvey can be used instead of an original survey until such time as rights have been acquired to a specific tract of land under the original survey. However, the original actual survey of public lands of the federal government on the faith of which rights have been acquired controls as against a survey subsequently made by the government affecting those rights.
>
> . . . . .
>
> "In making a resurvey, the question is, not where would an entirely accurate survey locate the lines, but where did the original survey locate the lines. In all cases, the original survey, wherever possible, must be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it. The purpose of a resurvey is to furnish proof of the location of the lost lines or monuments, and not to dispute the correctness of the original survey or to control it." 145 So. 2d at 741-2.

The Supreme Court of the United States has made similar statements. See *Grand Rapids and Indiana Railroad Company* v. *Butler*, 159 U.S. 87, 94 (1895); *Keene* v. *Calumet Canal Company*, 190 U.S. 452, 461 (1902).

The reason for the rule that the Government's re-

surveys cannot affect vested rights is well stated by the United States Supreme Court in *Hardin* v. *Jordan*, 140 U.S. 371, 401 (1890) as follows:

> "If this were not so, the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title."

None of the cases cited by the Government involves a resurvey.

It would seem clearly unconstitutional for Congress to provide that a survey by a government agency may divest property rights without compensation, provided only that the agency acts in good faith. The question must be: Did the resurvey accurately retrace the lines of the original survey?

REPLY TO CONTENTION THAT DEPENDENT RESURVEYS MUST BE ACCEPTED AS HAVING RE-ESTABLISHED ORIGINAL BOUNDARIES WHEN CONDUCTED IN ACCORDANCE WITH THE MANUAL OF SURVEYING INSTRUCTIONS

1. There is no such contention or issue in the pre-trial order.

In accordance with the pre-trial order, as quoted previously, this case was tried and determined upon an inquiry into the surveyor's accuracy, not his con-

formity to the 1947 Manual of Surveying Instructions. The Government cannot now contend that the survey is binding, irrespective of its accuracy, if the surveyor followed Manual procedures.

The extent of this departure from the case as tried is indicated by the fact that although the Government's brief places great emphasis on the surveyor's supposed compliance with the Manual, the Manual was never introduced into evidence and there is no express reference to it in the transcript of testimony. The only witness who could testify that Manual procedures were followed was Floyd A. Brooks, the resurveyor. Brooks identified his instructions, which refer to the Manual (Tr. 10-12; Ex. 7, 8), but the writer can find no testimony by Brooks that he actually *followed* the procedures of the Manual in the field.

2. Under the governing statute, conformity to the manual is no substitute for accuracy.

As aforesaid, the statute governing resurveys contains the following provision:

> ". . . no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey. . . ." 43 U.S.C. 772.

It has been pointed out previously herein (see page 10) that defendants' rights had vested at the time of the resurveys, and that the resurveys, if inaccurate in the Government's favor, would divest defendants' bona fide rights in violation of the stat-

ute. Compliance with the Department's Manual cannot excuse a direct violation of the mandate of the statute. The question must be that framed by the pre-trial order herein: Were the resurveys accurate?

None of the cases cited by the Government involves a resurvey under this statute.

REPLY TO CONTENTION THAT DEFENDANTS WERE NEGLIGENT IN NOT FOLLOWING APPROPRIATE METHODS FOR DETERMINING THEIR BOUNDARIES

There is no such contention or issue in the pre-trial order, and such a contention is immaterial.

Defendants must again note that the sole factual issue framed by the pre-trial order as to the boundaries was whether the Government's resurveys were accurate. This is properly the issue.

It is incumbent upon the Government to prove that the defendants were cutting on government land. If they were, they were trespassers; if they were not, the Government has no complaint. It is wholly irrelevant to consider whether the defendants were negligent in determining the location of their boundaries, or whether they acted in good faith, or what methods they did or did not employ, or even whether they made any effort at all to locate their boundaries. The question is where the boundaries were, and the Government has the burden of proof here.

REPLY TO CONTENTION THAT THE ACCURACY OF THE RESURVEYS IS PROVEN BY PROOF THAT THE RESURVEYS WERE CONDUCTED IN ACCORDANCE WITH THE MANUAL

The Government in this portion of its argument (App. Br. 22-28) apparently recognizes that the controlling question must be the accuracy of the resurveys, and now argues that such accuracy is proven by evidence that the resurveyor followed the procedures set forth in the Manual of Surveying Instructions (United States Department of the Interior, 1947).

1. There is no evidence that the surveyor followed the procedures of the manual.

As aforesaid, the Manual was not introduced into evidence and the writer can find no direct testimony that the field work actually followed the procedures set forth in the Manual. However, as will appear, this point is not highly significant.

2. Evidence of compliance with 1947 Manual does not prove accurate retracement of 1872 survey.

It would seem apparent that evidence that the resurveyor followed the procedures of the 1947 Manual could be relevant as evidence of conformity to the original survey only if it were established that the original surveyor followed identical procedures. For example, if the techniques of alignment and measurement set forth in the 1947 manual are different from those employed by the 1872 surveyor, it is likely that

the resurveyor's footsteps would not be those of the original surveyor.

This is particularly important in this case, where the surveyor purported to find very few markers, and based his findings largely on his calculations as to where he thought the controlling monuments should have been. The 1947 Manual was not in evidence, and there is nothing in the record from which it can be deduced that it prescribed procedures similar to those followed 65 years earlier.

To the contrary, the testimony of the Government's own witnesses produced overwhelming evidence that the methods employed by Brooks in his resurvey were substantially *different* from those employed by Kincaid, the original surveyor, and that these differences produced substantially different results on the ground:

(1) The Government's Cadastral Surveyor for the Portland office of the Bureau of Land Management expressly testified that Kincaid's methods and instrumentation were different from the resurveyor's (Tr. 100), and testified that it was a common experience in the Northwest to find that old surveys weren't "up to par," and "they didn't do it maybe to regulation" (Tr. 90).

> "Our—maybe our methods now are a little bit better and we determine these a little closer. Maybe in the future they'll have them closer, and they'll say that our work is way off as far as distance goes." (Tr. 98)

(2) The Government's witness Brooks, the re-surveyor, expressly admitted that the variance between his figures and Kincaid's suggested to him that different methods were employed by the two men:

"THE COURT: Well, wasn't that of some significance to you in the survey, that yours [boundary measurements] did not coincide with the original surveys?

THE WITNESS: Well, sir —

THE COURT: Wasn't that what you were attempting to do?

THE WITNESS: To establish the original survey.

THE COURT: Yes.

THE WITNESS: Right. Quite often in re-tracing these original surveys, we find this type of discrepancy.

THE COURT: Well, that may be true, but wasn't it of some significance to you that there was that difference in re-establishing your own lines?

THE WITNESS: Yes.

THE COURT: That *one survey may have been made on one theory and the other made on another theory?*

THE WITNESS: *Yes.*

THE COURT: Now, your survey was made on the way that you thought the survey *should have been made?*

THE WITNESS: This is correct." [Emphasis added] (Tr. 44).

Specifically, Brooks testified as to variances between his and Kincaid's methods of measuring dis-

tances on slopes (Tr. 37, 62), he testified that he "closed his lines" while Kincaid did not (Tr. 37, 39, 40), he and his supervisor testified that Kincaid used a different method for determining bearings (Tr. 64, 104).

Brooks testified that Kincaid's methods produced "distortions" from Brooks' findings (Tr. 64) and that Brooks' bearings and distances proved different from Kincaid's (Tr. 60, 61).

The results of the above discrepancies were hardly trivial: Brooks found the South boundary of the township to be 283 feet shorter than Kincaid found it (Tr. 41-42), he admitted that his center point of the South boundary might be 385 feet off Kincaid's (Tr. 42-43), and he admitted substantially different findings as to the length of the North and West boundaries of the township (Tr. 43-44). Brooks' supervisor, Irving Zirpel, Jr., testified that in particular cases Kincaid's notes showed distances of 40 and 80 chains while Brooks' resurvey indicated distances of 36 and 72-79 chains respectively (Tr. 99).

The foregoing demonstrates that the Government cannot prove that its resurvey accurately re-established the original survey by showing that the resurvey followed the 1947 Manual procedures. To the contrary, the evidence of the many and significant differences between the methods and results of the original surveyor and those of the resurveyor compel the conclusion that by following the 1947 procedures in this case the resurveyor *insured* departure from the footsteps of the 1872 surveyor.

Although the Government's present methods may be better than those employed by Kincaid, and although Kincaid might have done a better job, the point remains that, as recognized by the Government's brief, *the original monuments control the rights of the parties*, irrespective of where they *should* have been located, and, where monuments can be located only by calculation, the resurveyor must calculate as the original surveyor did, irrespective of the inferiority or inaccuracy of the original surveyor's methods. For example, in this case, where the original surveyor measured distances by slope measurement, the resurveyor should have done the same, instead of using horizontal measurements. As the court developed in examining Brooks, the variances between his results and Kincaid's demonstrated to him the difference in methods used, but Brooks persisted in making the survey as the original "should have been made."

3. There was ample evidence that the resurvey was inaccurate.

As set forth above, the resurveyor employed different methods of calculation than those employed by the original surveyor, and admitted substantially different results. Beside the variance which necessarily followed the different methods employed by Brooks, there was evidence that even the few markers found and relied on by him may not have been those of the original survey:

(1) Brooks testified that in his opinion the original surveyor set the stone which was the first marker

found by Brooks and which he assumed to mark the Southeast corner of Section 33 (Tr. 40, 48), and that "to a certain extent" Brooks' location of that corner would control *the rest of his work throughout the township* (Tr. 40). However, he admitted that the corner stone found by him was not marked as it should have been if it had actually been placed in 1872 by Kincaid to mark that particular corner (Tr. 51). The defendants' witness, Gail Thomas, a licensed surveyor, testified that in the course of his investigation he interviewed the former landowner's brother, who told him that the corner stone in question was placed only 30 to 35 years ago by himself and his brother, following a survey made by a man named Peck (Tr. 108, 141). This is supported by the testimony of Thomas Stephenson, a long-time resident of the area (Tr. 153), and by the fact that Brooks found at this point a marked witness tree which was not referred to in the original survey notes (Tr. 52), and Thomas found that tree to be only 70 years old and the surveyor's markings to be only 30 to 35 years old (Tr. 107, 126-127, Def. Exs. 36A, 36B). Thomas also testified that the methods used by Kincaid, as testified to by the Government's witnesses, would have produced a corner location about 700 to 800 feet to the east of the point relied on by Brooks (Tr. 110-111).

(2) Thomas directly controverted Brooks' location of the Southwest corner of Section 34 (Tr. 128-130), his location of the Southeast corner of Section 27, which discrepancy Thomas explained to have re-

sulted from the admitted difference between Brooks' and Kincaid's methods of slope measurement (Tr. 130), he controverted Brooks' location of the Southeast corner of Section 5, which was not marked as it should have been if it had been placed by Kincaid (Tr. 131). Thomas also pointed out that Kincaid's method of slope measurement would have placed that last corner further to the East than the rock found by Brooks (Tr. 131-2). Thomas controverted the location of corner markers purportedly found by Brooks in Section 36 ("a mismarked stone," Tr. 132), Section 13 ("a mismarked stone, . . . he overlooked six marks on the other side of the stone . . .," Tr. 133), and Section 16 ("these were unmarked basalt stones . . . there aren't enough trains in the world to haul all the rocks away in that area. They are in every size and every description, . . . So the possibility of finding two rocks of the same size are very — well, the possibility is good." (Tr. 134-135).

Thomas testified as to and explained substantial variances between the results of the Brooks resurvey and the original survey, summarized in his statements that the township as measured by Brooks was longer than as measured by Kincaid (Tr. 117), that there was "a great disparity" between the bearings of Kincaid and those of Brooks (Tr. 125), and that the area of the alleged trespass had been materially changed by the Brooks resurvey (Tr. 120-121).

From all the foregoing, it seems reasonable to conclude that many of the corner markers relied on

by Brooks were established by the Peck survey of the 1930's. Brooks himself testified that in his opinion Kincaid did not establish all the corners in the interior of the township (Tr. 45) and Thomas agreed, stating that such placement, which would have required Kincaid to travel and survey 119 miles and place 120 monuments in five days, was "impossible" (Tr. 137).

Furthermore, on cross-examination by the court, Brooks admitted that the methods used by the defendants in determining the areas which they might log could have accurately established the original survey lines, and that in that event there would have been no trespass (Tr. 167-168).

REPLY TO CONTENTION THAT FINDINGS ARE DEFICIENT

1. Findings are sufficient if the lower court's ruling is understandable.

The rule in this circuit, as elsewhere, is that the lower court's failure to make specific findings does not require a remand if a complete understanding of the issues may be had by the court of appeals without the aid of separate findings. *Graham* v. *United States*, 243 F.2d 919 (9th Cir. 1957). See also *Westley* v. *Southern Railway*, 250 F.2d 188 (4th Cir. 1957). Any defects will be waived where the error is not substantial. *Rossiter* v. *Vogel*, 148 F.2d 292 (2nd Cir. 1945).

2. The ruling here is clearly understandable.

The factual issues presented by the pre-trial order were simple:

> "(1) Did plaintiff accurately re-survey Township 11 South, Range 19 East, Willamette Meridian, Oregon, in accordance with the original survey?"
>
> (2) If issue No. 1 is answered in the affirmative, what value of timber did defendants cut and remove from lands of the plaintiff?" Pre-trial Order, page 4.

The Government based its case, as it must, on the original 1872 Kincaid survey:

> "The simple fact is that the suit was instituted 'based on the Kincaid survey.' " (App. Br. 23).

As recognized by the Government, the resurveys had no significance other than as evidence of the location of the lines of the Kincaid survey:

> "Thus, a dependent re-survey performed in accordance with the manual does not affect or change prior existing rights in the land. It establishes what those rights always have been" (App. Br. 26).

From the direct examination of the resurveyor:

> "Q. Is it correct then that *you were attempting* to in *effect follow the steps of the original surveyor* and determine where he placed the lines originally?
>
> A. This would be true." [Emphasis added] (Tr. 12).

The court made it absolutely clear that it found that Brooks did *not* actually retrace the original survey:

> "MR. BORGESON: Well, as I understand, he claims that he has retraced the footsteps of the original survey —
>
> THE COURT: Well, as a matter of fact, he hasn't. No matter what he says, if the original surveyor was ever out there on the ground, this isn't what the original surveyor went through." (Tr. 65-66).
>
> "On the plaintiff's contentions, I find that the Government has failed to prove plaintiff's Contentions 1, 2, and 3, and therefore, my findings are in favor of the defendant." (Tr. 174).

The latter were all the Government's contentions (see Pre-Trial Order, pp. 3-4).

The Government argues that the lower court did not understand that the function of a dependent resurvey is to re-establish the lines of the original survey. This argument insults the court's intelligence. The function of the resurvey was plainly explained by the resurveyor Brooks at the onset of the Government's case (Tr. 12). The significance of discrepancies between the original survey and the Brooks resurvey permeates all the examinations by counsel. The court's own examination of Brooks, particularly the questioning at Tr. 64-65, makes it plain that the court recognized the obvious function of the resurvey, and that the court found, as it plainly stated at Tr. 65-66, that the resurveyor did not discharge that function, that is, he did not retrace the original lines.

Brooks in fact did not really *attempt* to locate the actual original lines, and the court recognized this. The court asked Brooks if it was not the fact that "your survey was made in the way that you thought the survey *should* have been made?", and Brooks answered in the affirmative (Tr. 44). The court stated that "in fact, what you (Brooks) are saying is that you made a new survey; isn't that true?" (Tr. 64). The court's preservation of the Government's right to a retrial "based on the Kincaid survey" is not evidence of the court's misunderstanding of the function of a dependent resurvey, as the Government contends, but is consistent with the court's view that Brooks' survey was not evidence of the location of Kincaid's lines, but was instead "a new survey" made in the way Brooks thought the original survey "should have been made." The court's statement that there was "a failure of proof" (Tr. 175) is also consistent with its view that Brooks' survey was not evidence of the lines of the original survey. The testimony as to damages was based entirely on the Brooks survey (Tr. 84), and the court obviously felt that the Government was entitled to a chance to prove its damages based upon evidence of the Kincaid survey.

CONCLUSION

Findings of fact are not set aside unless clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure, *Jerrigan* v. *Southern Pacific*, 222 F.2d 245 (9th Cir. 1955). If the inferences drawn from the

evidence by the trial court are those which could have been drawn by reasonable men, this court will accept those inferences. *Lundgren* v. *Freeman*, 307 F.2d 104 (9th Cir. 1962).

The court here found that the plaintiff failed to prove its case because the Brooks resurvey was not in fact evidence of the location of the original lines. The record is replete with evidence to support that finding, and it should stand.

Respectfully submitted,

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BRIEF ON CROSS-APPEAL

STATEMENT OF JURISDICTION

Defendants adopt and incorporate herein the Government's statement of jurisdiction as set forth in its opening brief.

STATEMENT OF THE CASE

This was an action by the Government for trespass. The facts and issues are well set out in the preceding briefs. At the conclusion of the case, and after both sides had presented their evidence and rested, the court found that "there was a failure of proof" (Tr. 175) on the part of the Government in that the resurveys relied on by the Government did not accurately locate the original boundary over which the Government claimed the defendants had logged. The court found against the Government on all its contentions (Tr. 174). However, the court gave judgment for defendants *without prejudice* to the Government's right to institute a new action. The question presented here is whether the court abused its discretion in dismissing without prejudice, rather than with prejudice.

SPECIFICATION OF ERROR

The District Court erred in dismissing without prejudice to the Government. The dismissal should have been with prejudice.

SUMMARY OF ARGUMENT

Good cause must be shown for a dismissal to be without prejudice where the plaintiff has presented his case and failed in his proof. The law favors disposition of civil litigation on the merits, and this policy is particularly strong where the case has been fully tried on the merits. No cause has been shown why this dismissal should not be with prejudice, and none exists.

ARGUMENT

1. Where the plaintiff has presented his case and there is a failure of proof, good cause must exist for the dismissal to be without prejudice.

In *Safeway Stores* v. *Fannan*, 308 F.2d 94 (9th Cir. 1962), this Court made it plain that good cause must exist for a dismissal to be without prejudice where it is ordered after presentation of the plaintiff's case. In that case, at the conclusion of the plaintiff's case the District Court (District of Oregon) dismissed without prejudice, following the defendant's motion for a directed verdict. The defendant appealed from the part of the judgment making the dismissal without prejudice. This Court, after finding that there had been a failure of proof, 308 F.2d at 98, and after concluding that the court had the power to dismiss on its own motion, 308 F.2d at 99, modified the judgment by making the dismissal *with* prejudice, stating as follows with regard to the

court's discretion to make a dismissal without prejudice:

> "That discretion, however, is a judicial, not an arbitrary one, and we can find nothing in the present record to sustain its exercise. Counsel for Fannan made no suggestion to the court that other evidence might be procured, or that he was surprised (in a legal sense, as distinguished from the usual 'surprise' of a losing counsel), or of any other reason why the matter should not have followed the normal course to a judgment on the merits, nor has any such suggestion been made to us. The record would not support a conclusion by us that Fannan's counsel butchered the case. The judge suggests no ground other than his apparent relief [sic] that the dismissal should be 'without prejudice.'
>
> "Under these circumstances, we conclude that the judge erred." 308 F.2d at 99.

This case is similar: There is no suggestion that other evidence might be produced. To the contrary, the resurveyor Brooks admitted that in his second resurvey of this area, he found no more additional original monuments than he found in his firse resurvey (Tr. 167). There is no surprise in the legal sense, and defendants feel that counsel for the Government certainly did not "butcher" the case.

2. A dismissal without prejudice after a full trial on the merits is contrary to the policy of the law.

The law favors the disposition of civil litigation on its merits. *Davis* v. *Parkhill*, 302 F.2d 489 (5th

Cir. 1962), *Meeker* v. *Rizley*, 324 F.2d 269 (CA Okla. 1963).

The policy favoring disposition of civil litigation on its merits has particular application where, as here, the cause has been submitted to the trier of fact, and there is ample evidence in the authorities of a strong policy against allowing a nonsuit or dismissal without prejudice at that stage of the proceedings:

(1) Defendants find no American jurisdiction which still permits a nonsuit as a matter of right after submission. See cases annotated 89 ALR 13.

(2) Statutes in many states have abolished even the court's discretionary power to allow a nonsuit after submission. See cases annotated 89 ALR 74.

(3) Defendants find no case under the Federal Rules of Civil Procedure granting or upholding a dismissal without prejudice after submission. To the contrary, defendants cite *Safeway Stores* v. *Fannan*, discussed above, and the following:

In *Moore* v. *C. R. Anthony Company*, 198 F.2d 607 (10th Cir. 1952), the court upheld denial of a motion for a dismissal without prejudice after submission of the cause, stating:

> "The avowed purpose of the rule (Rule 41 of the Federal Rules of Civil Procedure) was to prevent the dismissal of cases without prejudice after trial and in the face of an impending unfavorable judgment." 198 F.2d at 608.

In *Piedmont Interstate Fair Association* v. *Bean*, 209 F.2d 942 (4th Cir. 1954), the court vacated an order allowing the plaintiff to dismiss without prejudice after service on third-party defendants, answers and preliminary motions, stating as follows:

> "The voluntary dismissal of an action by a plaintiff after participation in the trial and after the judge has expressed an adverse opinion of the merits of his claim has not been favorably regarded by the courts." 209 F.2d at 948.

Discussing the effect of the Federal Rules, the court said:

> "The prejudice to the defendant which justifies the court in refusing permission to the plaintiff to dismiss is more carefully considered, and it is no longer true to say, as was so often said in the decisions preceding the Federal Rules, that 'the incidental annoyance of a second litigation upon the subject matter' furnishes no ground for denying the plaintiff permission to dismiss his complaint." 209 F.2d at 946.

In *Cincinnati Traction Building Co.* v. *Pullman*, 25 F. Supp. 322 (D.C. Del. 1938), the plaintiff moved for a voluntary nonsuit after answer, preliminary motions, interrogatories and depositions. The court denied the motion, stating:

> "Plaintiff has chosen the forum and has required defendant to answer and prepare its defense at great expense. In such case defendant is entitled to have the controversy finally adjudicated so that it may definitely know its rights." 25 F. Supp. at 322-323.

The policy evidenced by such cases is applicable here, where the Court undertook to grant the Government a new day in court.

CONCLUSION

After a complete trial on the merits, a strong showing must be made for granting the unsuccessful plaintiff leave to bring a new action. There was no such showing here. The Government resurveyed the land in question twice, but its surveys failed to produce proof that the boundary line was as claimed by the Government. The monuments and the land are no more capable of accurate resurvey today than they were when resurveyed twice previously. The Government has had its day in court and has failed to prove its case. The matter should be finally determined; the dismissal should be with prejudice.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellees.